85-804

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1985

XHEVEDET LIKA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN L. POLLOK
Attorney for Petitioner
Xhevedet Lika
477 Madison Avenue
New York, New York 10022
(212) 688-7788

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Questions Presented

1. Was The Petitioner Deprived Of A Fair Trial And Due Process of Law As A Result Of Proof Of Multiple Conspiracies Introduced At His Trial?

2. Was The Petitioner Deprived Of Due Process Of Law And His Right To Confrontation During His Sentencing Proceeding?

3. Should The Rule of *Gardner v. Florida*, 430 U.S. 349 (1977) Be Extended To A Non-Capital Case Where The Maximum Punishment Is Life Imprisonment Without Possibility Of Parole?

List of the Parties

Apart from the Petitioner, the other parties involved in the trial were Skender Fici, Bari Drishti, Nazif Vrlaku and Stella Millaj.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Xhevedet Lika (hereinafter "the Petitioner") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction entered against the Petitioner by the United States District Court for the Southern District of New York (Broderick, J.).

Opinion Below

The unpublished opinion and order of the Court of Appeals affirming the judgment of conviction appears in Appendix "A," *United States v. Fici, et. al.*, Docket Nos. 85-1086, 85-1089, 85-1092 (2d Cir., decided 9/12/85).

Jurisdiction

The date of the order of the Court of Appeals affirming the judgment of conviction is September 12, 1985. This Court's Jurisdiction in invoked pursuant to Title 28, United States Code §1254(1).

Constitutional and Statutory Provisions Involved in the Case

Amendment V, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State or district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counse' for his defence.

Statement of the Case

The Petitioner was convicted of conspiring to import, possess with intent to distribute and distribute heroin in violation of 21 U.S.C. §§ 963 and 846; of engaging in a continuing criminal narcotics enterprise ("CCE") in violation of 21 U.S.C. § 848; of conspiring to violate the racketeering laws ("RICO") in violation of 18 U.S.C. § 1962(d); and of five separate substantive violations of the federal narcotics laws involving either possessing with intent to distribute or actually distributing heroin in violation of 21 U.S.C. § 841(a)(1).

The Petitioner, a first offender, was sentenced to life imprisonment on the "CCE" count; to 15-year concurrent terms of imprisonment for three of the substantive violations; to 15-year consecutive terms of imprisonment (totaling 30 years) for the other two substantive violations; and to a 20-year consecutive term for the "RICO" violation. Additionally he was fined a total of $250,000, ordered to forfeit property as a result of the "CCE" and "RICO" convictions and placed on special parole for the remainder of his life.

The Petitioner is presently serving his sentence.

A. The Government's Proof At Trial

The indictment, which originally contained thirty counts,* charged the Petitioner and ten others with, in essence, engaging in a six-year conspiracy to import, possess, and distribute cocaine and heroin.** The govern-

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* Seventeen of the twenty-five substantive counts originally charged were not submitted to the jury because venue for those offenses lay only in the Eastern District of New York.

** The other named defendants were Skender Fici, Bari Drishti, Luan Lika, Mehmet Bici, Anver Kalbas, Nazif Vrlaku, Arian Krilu, Vuksan Vulaj, Dujo Saljanin, and Stella Millaj. Of those named, only Skender Fici, Bari Drishti, Nazif Vrlaku and Stella Millaj stood trial with the Petitioner, and Nazif Vrlaku's case was severed from the others prior to the case being submitted to the jury. Millaj was acquitted; Fici and Drishti were convicted and were sentenced to 40- and 20-year prison terms, respectively.

ment's own indictment characterized this enterprise which also included at least fifteen unindicted co-conspirators, as a "loose-knit group of Albanian and Yugoslavian drug dealers allied together for the purpose of importing and distributing narcotic drug controlled substances."

The government's case rested almost entirely on the testimony of a number of accomplice witnesses who described the drug dealing activities which took place in the Albanian-Yugoslavian community in New York. Mehmet Bici, the government's first witness and a previously convicted murderer, described how, in 1979 and 1980, the Petitioner purchased drugs from numerous sources, both in New York and abroad, and with Bici and his other partners, Vuksan Vulaj and Leon Ducajini, distributed the drugs to dealers on Manhattan's lower east side. Bici also implicated the Petitioner in the murder of Dujo Saljanin, a drug smuggler. According to Bici, Saljanin stole a kilogram of heroin from him, the Petitioner and Vuksan Vulaj, and, as a result, the three of them murdered him.

Frederick Durda picked up the story in 1982 during the time Bici was in prison as a result of his murder conviction. Durda related how he originally was employed by a rival drug dealer, Petitioner's co-defendant Bari Drishti, who supplied the Petitioner with cocaine for his personal use. Durda identified Drishti's heroin sources and customers as being entirely different from Petitioner's.

After Durda and Drishti had a falling out, Durda went to work for the Petitioner and he testified that he assisted the Petitioner in distributing quantities of heroin to many of the same lower east side customers previously identified by Bici. Finally, after the Petitioner discovered that Durda and his friend, Anesti Myshtari, had stolen three kilograms of heroin from him and his associates, Durda testified that the Petitioner made several attempts to kill him.

Accomplices Kabril Bajrami and Theresa Schroeder described co-defendant Skender Fici's drug dealings. Specifically, Schroeder related how she was recruited by Fici to import a kilogram of heroin from Turkey into the United States in 1979 and Bajrami related how he and Fici had attempted to sell that heroin in New York.

George Mouhalis, another accomplice, testified that he purchased multi-ounce quantities of heroin from the Petitioner and his brother on numerous occasions between 1981 and 1983. Mouhalis' testimony was corroborated by undercover detective, Manny Inglesias, who purchased heroin from Mouhalis and his partner George Kikos.

Another undercover detective testified regarding heroin purchases he made in 1981 from Bari Drishti, Rafik Vaselli, and Demir Asllani. These transactions were wholly unrelated to the Petitioner.

Finally, a Drug Enforcement Administration undercover agent testified about cocaine he purchased from co-defendant Nazif Vrlaku in early 1982, as well as discussions he had with Vrlaku regarding future purchases (never consummated) of multi-kilogram quantities of heroin. The government offered the grand jury testimony of an absent witness, informant John Berisha, to establish that Skender Fici was Vrlaku's drug supplier. Again, these transactions were unconnected to the Petitioner.

The government also introduced Petitioner's post-arrest statements; firearms seized from both Petitioner's and Fici's residences; and small quantities of narcotics, "cutting" materials and narcotics paraphernalia seized from Petitioner's and co-defendant Millaj's residences and various financial records and other documents.

B. The Defense Case

Petitioner called Vitore Vulaj, the wife of his deceased co-conspirator, Vuksan Vulaj, to testify that her husband had told her that the Petitioner had not participated in the Saljanin murder with him and Bici. Petitioner also recalled Detective Ielardi to establish that Ielardi, who had met the Petitioner in an undercover capacity, had been unable to engage him in narcotics-related conversations. DEA agent Delmore also testified that no large sums of money had been uncovered and that DEA had not utilized pen register devices or analyzed telephone toll records in connection with its investigation.

C. The Sentencing Proceedings

At Petitioner's sentencing hearing, the government called the United States Attorney for the Southern District of New York to testify that he had interviewed an informant who told him that the Petitioner had offered substantial sums of money to kill the Assistant United States Attorney and the DEA agent in charge of his case. When, on cross-examination, the trial court barred Petitioner's counsel from inquiring as to the anonymous informant's identity or the sources of his information, counsel proffered that Petitioner believed the informant to be a former cellmate who bore him substantial animus. Nevertheless, the court prohibited any inquiry which might have revealed the informant's identity. Then, at oral argument of Petitioner's appeal, counsel for the government revealed for the first time that the sentencing judge was aware of the informant's identity because the informant's name was reflected in sealed documents which had been provided to the district court.

REASONS FOR GRANTING THE WRIT

The Proof At Trial Manifestly Established Multiple Conspiracies Which So Prejudiced Petitioner That It Deprived Him of His Right to a Fair Trial.

Not since *Kotteakos v. United States*, 328 U.S. 750 (1946), has this Court spoken on the issue of multiple conspiracies, although the government's increasing use of massive conspiracy indictments charging numerous defendants to be tried at the same time has made this a recurrent problem in the Courts of Appeals. *See, e.g., United States v. Sperling*, 506 F.2d 1324 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). The Second Circuit, in assessing whether proof of multiple conspiracies exists, has long applied the standard that "[w]hether [the government] has proved the existence of [the] conspiracy and each appellant's membership in it or has instead proved multiple other independent conspiracies is a question of fact for a properly instructed jury [citations omitted]." *United States v. Alessi*, 638 F.2d 466, 472 (2d Cir. 1980). And, even if the existence of multiple conspiracies is evident, one must still demonstrate that the variance between the proof and the charge caused substantial prejudice. *Berger V. United States*, 295 U.S. 78 (1935). Petitioner submits that in an age of blockbuster indictments, where the government completely controls the fashioning of the indictment and the proof ultimately to be offered in support thereof, these long established standards are no longer adequate to safeguard a defendant's right to a fair trial and, more specifically, his right to have a jury find him individually guilty.

This case is a prime example. The government aggregated evidence from various sources, much of which was highly charged dealing with heroin, violence, and even homicides, and offered it under the umbrella of a single conspiracy when much of the proof could be linked only to one defendant or the other. The trial judge, facing a long and complex case, failed to grasp the significance of some of the proof until the evidence was more fully developed and, therefore, admitted much of

the testimony subject to "connection." By the time the existence of multiple conspiracies was clear, it was too late to exclude or limit the impact of the prejudicial proof. However the trial judge realized that he could easily save the case by instructing the jury on the issue of multiple conspiracies. *United States v. Cambindo-Valencia*, 609 F.2d 603 (2d Cir.), *rehearing denied* (1979).

Even so, the trial court initially charged the jury that "you *must be sure* that your finding is that it is that conspiracy that he became a member of and not one of the other conspiracies to import" (emphasis added). Clearly, "must be sure" is not a legally cognizable equivalent of the burden of proof in a criminal case. *See, United States v. Drake*, 673 F.2d 15 (1st Cir. 1982) (condemning the use of "moral certainty" language as the functional equivalent of reasonable doubt). Moreover, the trial court's charge was a fatal departure from the language oft-approved by the Second Circuit; that is, "[i]f you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you *must acquit* that defendant" (emphasis added). *United States v. Taylor*, 562 F.2d 1345, 1351 (2d Cir.), *cert. denied*, 432 U.S. 909 (1979), quoting *United States v. Tramunti*, 513 F.2d 1087, 1107 (2d Cir.), *cert. denied*, 432 U.S. 832 (1975). Nevertheless, the Court below held that the "district court's jury instructions as supplemented, were proper."*

In sum, this case well illustrates the problem with how the law of multiple conspiracies is presently applied. The government can offer any proof and justify it by the representation that it will ultimately be connected to the charged conspiracy. The trial judge can admit the proof subject to connection. Then if it turns out the government was wrong, the court can delegate its responsibility

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* After defense counsels' objection to its initial charge, the trial court did supplement its instructions. However, when compared to its earlier rambling, disjointed explication of the multiple conspiracy issue, these supplemental instructions were clearly inadequate.

to sift the admissible from the inadmissible, Rule 104(a), F.R.Evid., to the jury by charging them to distinguish one conspiracy from another.

This Court should, Petitioner submits, grant certiorari in this case to review the prevalent problem of multiple conspiracies and announce new standards which will better assure fundamental fairness in criminal trials.

The Sentencing Proceeding Deprived Petitioner of His Fifth Amendment "Due Process" and Sixth Amendment "Confrontation" Rights.

In *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978), the Second Circuit held that a sentencing judge could rely on anonymous informant information if there was a showing that there is "good cause for the non-disclosure of his identity and there is sufficient corroboration by other means." The Court of Appeals found that the second prong of the *"Fatico"* test -- adequate corroboration -- had been satisfied here, but completely ignored the "good cause" for non-disclosure prong, which was the very crux of Petitioner's argument. Indeed, we submit that Petitioner's proffer to the trial court was adequate to compel further inquiry into the informant's identity since if Petitioner was correct that the informer was his former cellmate, the government's informant privilege was vitiated. *Roviaro v. United States*, 353 U.S. 53, 60 (1959). Moreover, the government's interest in preventing disclosure of an informant whose identity should not have been revealed was minimal in this case since, by either confirming or denying that the informant was Petitioner's cellmate, the universe of possible informants was reduced by only one.

Given the highly prejudicial nature of this evidence and the sentence imposed in this case, the court below clearly erred in affirming the trial court's ruling restricting Petitioner's right to cross-examine.

The Disclosure of Secret Information to the Sentencing Court Deprived Petitioner of His Fifth Amendment Due Process Rights.

At oral argument of the Petitioner's appeal, it became evident that the trial judge, at the time of sentencing, had before him secret, sealed information which could have impacted upon the sentence imposed. Specifically, the sentencing judge at least had knowledge of the identity of the informant[s] who had implicated the Petitioner in a plot to murder the prosecutor and a DEA agent.*

This Court has specifically condemned the practice of presenting secret information to a sentencing judge in a capital case. *Gardner v. Florida*, 430 U.S. 349 (1977). It is our position that the *Gardner* rule should be extended to this closely analogous situation where the maximum penalty is life imprisonment without possibility of parole. The same rationale which led the *Gardner* Court to express a heightened concern for the due process and confrontation rights of a defendant facing the death penalty exists here, except that rather than the state directly taking the prisoner's life, it deprives him of his liberty until such time as he dies of natural causes. Such a fine distinction as that should not determine the application of due process of law.

Because of the lack of a hearing or any indication on the appellate record of the nature of the sealed information before the sentencing court, it is impossible to determine how that could have affected the sentencing process. Therefore, certiorari should be granted so that this Court may review the significant constitutional questions raised by the sentencing proceeding below.

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* When this information came to light, Petitioner filed a supplemental memorandum with the Court of Appeals raising this issue. However, the Court's memorandum decision makes no reference to this issue or Petitioner's supplemental memorandum.

CONCLUSION

FOR THE FOREGOING REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

JOHN L. POLLOK
Attorney for Petitioner
Xhevedet Lika
477 Madison Avenue
New York, New York 10022
(212) 688-7788

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
For The Second Circuit

Docket Nos. 85-1086, 85-1089, 85-1092

UNITED STATES OF AMERICA,
Appellee,

v.

SKENDER FICI, a/k/a "Kenny," XHEVEDET LIKA, a/k/a "Joey," and BARI DRISHTI, a/k/a "Benny,"
Defendants-Appellants.

Present: Honorable JON O. NEWMAN, Honorable RALPH K. WINTER, Circuit Judges. Honorable ALBRET W. COFFRIN, Chief Judge, U.S. District Court for the District of Vermont, sitting by designation.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of Sept., one thousand nine hundred and eighty-five.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

ORDER

Skender Fici, Xhevedet Lika and Bari Drishti appeal from judgments of conviction entered in the United States District Court for the Southern District of New

York (Vincent L. Broderick, Judge). Fici was convicted of conspiracy to import and distribute heroin, 21 U.S.C. §963, of distributing heroin, 21 U.S.C. §841, and of conspiring to participate in the affairs of an illegal enterprise through a pattern of racketeering involving narcotics trafficking, murder and attempted murder, 18 U.S.C. §1962(d). Lika received convictions for the same three offenses, and also for operating a continuing criminal enterprise, 21 U.S.C. §848. Drishti was convicted of conspiracy to distribute narcotics, and also of possession of heroin with intent to distribute it, 21 U.S.C. §841. The defendants, either together or separately, raise several points in this appeal. We affirm the district court with respect to each.

On the issue of whether the evidence established single or multiple conspiracies, the district court's jury instructions, as supplemented, were proper. As was specifically requested by defendants, the court several times stressed that the jury must " 'find that [the defendant] was a member of the conspiracy charged in the indictment and not some other conspiracy.' " *United States v. Tramunti*, 513 F.2d 1087, 1107 (2d Cir.) (quoting with approval district court's instructions), *cert. denied*, 423 U.S. 832 (1975). Althrough defendants took exception to the initial charge, they voiced no objection on this point to the supplemental charge, which they had specifically requested. We also find that the evidence presented was sufficient to support the jury's finding of a single conspiracy. Since the issue of whether the evidence establishes a single conspiracy is one for the jury, *United States v. Bagaric*, 706 F.2d 42, 63 n. 18 (2d Cir.), *cert. denied*, 104 S.Ct. 134 (1983), since the jury was properly charged, and since the evidence was sufficient to support the jury's findings, we find no merit to defendants' contentions in this regard.

We also find no merit to defendant Drishti's claim that the instruction concerning withdrawal from a conspiracy was improper. The instruction set forth the law clearly and there was sufficient evidence in the record to establish that Drishti's withdrawal from the conspiracy was at most only temporary. Furthermore, no limiting instruction was requested. The court instructed that membership in a conspiracy terminates when affirmative acts which are inconsistent with the conspiracy's purpose, and which are reasonably calculated to come to the attention of co-conspirators, are performed. App. 101-02. This is sufficient. *See United States v. James*, 609 F. 2d 36, 41-42 (2d Cir. 1979), *cert. denied*, 445 U.S. 905 (1980).

The court's admission of the grand jury testimony of unavailable witness Gjon Berisha against defendant Fici was also proper. The evidence adduced at the hearing held pursuant to *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982), *cert. denied*, 104 S.Ct. 2385 (1984), was sufficient, despite some of its hearsay nature, to support the judge's conclusion that Berisha's absence was the result of threats from Fici and his family. Whether hearsay is reliable testimony in such instances is a question largely left to the trial judge's discretion. *Id.* at 273. Whether Berisha was in fact unavailable to testify, or should have been placed in protective custody earlier so as to be available, is also largely within the district judge's discretion and should not be disturbed in this instance. There was considerable evidence of threats to Berisha or his family by Fici, *see* App. 200, including testimony from Berisha's wife that Fici had threatened the entire Berisha family, and gunshots that were fired at Berisha as he left his mother's home one morning. We find no abuse of discretion and, accordingly, affirm the district court in this regard.

We also reject Drishti's contention that he was prejudiced by his co-defendants' unruly behavior at trial. Drishti never requested that his trial be severed, and much of the unruly behavior occurred outside of the jury's presence. Moreover, although Drishti never requested a limiting instruction in this regard, the district judge specifically charged the jury to consider each defendant separately. App. 110.

The problem involving the publicized indictment of co-defendant Vrlaku's attorney on narcotics charges was handled properly by the trial judge. The judge first determined which jurors had seen the article, and then individually interviewed any jurors that had. This process had been previously approved by counsel. Tr.3639. Trial judges are in a superior position to evaluate the effect that such outside influences might have on jurors. Because of this, their discretion in this regard must be upheld absent its clear abuse. We find no such abuse.

Defendant Lika contends that the evidentiary sentencing proceeding held pursuant to *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978) *(Fatico I)*, violated his rights under the due process and confrontation clauses of the Fifth and Sixth Amendments, respectively, in that the identities of Government informants were not disclosed to him. At the *Fatico* hearing, testimony was presented by R.W. Giuliani, United States Attorney for the Southern District of New York, that several persons had independently informed the Government of murder contracts which had been entered into by Lika and which were aimed at Assistant U.S. Attorney Alan Cohen and Drug Enforcement Agency Agent John Delmore. Corroboration of statements made by confidential informants may be derived from information

supplied by other confidential informants. *United States v. Fatico*, 603 F.2d 1053, 1056-57 (2d Cir. 1979) *(Fatico II)*, *cert. denied*, 444 U.S. 1073 (1980). Moreover, other evidence submitted throughout the trial supports the court's conclusion that the information regarding the murder contracts was accurate. *E.g.*, Tr. at 1673-75. Finally, trial judges are granted a great deal of discretion regarding the admissibility of hearsay testimony at sentencing proceedings. *Fatico II*, *supra*, 603 F.2d at 1056-57. We find no abuse of that discretion in this case.

A final contention, raised by Drishti, is that his sentence, although within statutory limits for the crimes of which he was convicted, was excessive and should be reduced. We see no evidence, however, that the district judge relied on constitutionally impermissible factors or materially incorrect information in this instance, and, accordingly, must affirm. *United States v. Hutcher*, 622 F.2d 1083, 1089 (2d Cir.), *cert. denied*, 449 U.S. 875 (1980).

The judgment of the District Court is affirmed. The mandate shall issue forthwith.

/s/ _____

/s/ _____
Circuit Judges.

/s/ _____
District Judge.